

IN THE COURT OF MILITARY
COMMISSION REVIEW

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| |) | |
| |) | APPELLANT MOTION FOR |
| |) | CONTINUANCE |
| |) | |
| |) | Case No. 00000001 |
| v. |) | |
| |) | Tried at Guantanamo Bay, Cuba on |
| |) | 4 June 2007 |
| OMAR AHMED KHADR |) | |
| a/k/a “Akhbar Farhad” |) | Before a Military Commission |
| a/k/a “Akhbar Farnad” |) | Convened by MCCO # 07-02 |
| a/k/a “Ahmed Muhammed Khali” |) | |
| |) | Presiding Military Judge |
| |) | Colonel Peter E. Brownback III |

Relief Sought

COMES NOW the Government and respectfully requests that this Court grant a continuance until 19 July 2007 for the Government to submit additional briefing for the Court's consideration in appealing the trial court's 4 June 2007 order and 29 June 2007 ruling dismissing and sustaining the dismissal of all charges and specification in the case *United States v. Khadr*. The Government also requests clarification for future cases on the rules governing the time for filing briefs in appeals by the United States to the Court of Military Commission Review.

Rule 21(a) of the Rules of Practice of the Court of Military Commission Review provides that this Court “ may extend any time limits prescribed...in such a manner as may appear to be required for a full, fair, and expeditious consideration of the case.”

Statement of Facts

- a. On 4 June 2007, the Military Judge issued an order in the case *United States v. Khadr* dismissing all charges and specifications without prejudice.
- b. On 8 June 2007, the Prosecution filed a Motion for Reconsideration with the Military Judge.
- c. On 29 June 2007, the Military Judge issued P001, entitled Disposition of Prosecution Motion for Reconsideration, denying the Prosecution's request for reconsideration.
- d. On 3 July 2007, the Government requested guidance from the Deputy Clerk of the Court of Military Commission Review due to the many provisions that touch on the procedures for filing an appeal. The Deputy Clerk advised prosecutors of his preliminary view that "the appeal" must be filed within 5 days of the judge's ruling. In an abundance of caution and in an attempt fully to comply with the Deputy Clerk's preliminary advice, the Government drafted its appellate brief virtually overnight, as opposed to taking a full 30 days to which the Government should be entitled. *See* Court of Military Commission Review Rule of Practice 14(c)(1).
- e. On 11 July 2007, the Court issued a Briefing Order establishing an 18 July 2007 filing deadline for the Defense response to the Government's brief.
- f. Later, on 11 July 2007, the Defense filed a Motion for Emergency Relief, requesting a continuance until 3 August 2007 for the Defense to file its response brief.
- g. Early on 12 July 2007, the Government sent an e-mail to the Clerk of Court notifying the Court to anticipate the filing of an opposition motion to the Defense's Motion for Emergency Relief. The basis for that opposition was the extremely expedited timetable on which the Government filed its brief. Prior to the Government's filing of the opposition motion, the Court

granted the Defense's Motion for Emergency Relief, extending their filing deadline to 3 August 2007.

Discussion

I

In light of the Court's ruling on the Defense's Motion for Emergency Relief, the Government similarly requests an extension until 19 July 2007 to submit additional briefing which may include a brief more fully addressing the critical issues pending before this Court. The Government acted out of an abundance of caution after receiving the Acting Deputy Clerk's preliminary advice by filing the brief within five (5) calendar days of the Trial Court's ruling (which included two weekend days and a federal holiday). Therefore, the Government requests a 19 July 2007 deadline to submit any amended or additional briefing materials so that the Court may make a full, fair, and expeditious consideration of all of the legal issues presented in this case. The Defense's Motion for Extraordinary Relief demonstrates that the Defense will not be prejudiced by the arrangement that the Government now requests, as Defense counsel is on travel to Guantanamo for much of time period before July 19 and is just beginning to familiarize himself "with this difficult area of the law." Def. Mot. at 5.

The Government further notes that this schedule will provide roughly equal time for the preparation of submissions to this Court: The Government had five calendar days to prepare (and in reality spent less than one day preparing) its brief on appeal, and is now requesting seven additional days to prepare a more comprehensive submission. On the schedule proposed herein, the Defense will have 14 days to respond to the Government's 19 July submission to this Court.

II

The Government also requests this Court take this opportunity at the beginning of this Court's existence to clarify the rules governing the time for filing briefs. The provisions in the

Military Commissions Act of 2006 (MCA), the Rules for Military Commission (RMC), the *Regulation for Trial by Military Commission*, and the Court of Military Commission Review Rules of Practice provide potentially conflicting guidance.

Section 950d(a) of the MCA governs appeals from rulings that terminate "proceedings of the military commissions with respect to a charge or specification." The notice of appeal must be filed within five days after the order or ruling. Section 950d(b). The appeal will be "forwarded, by means specified in regulations prescribed by the Secretary of Defense, directly to the Court of Military Commission Review." Section 950d(c).

The Rules for Military Commissions ("RMC") echo these statutory procedures. RMC 908(b)(2) requires the Government to file a notice of appeal within five days of the ruling being appealed. The rules further state that the manner in which the appeal is filed directly with the Court of Military Commission Review shall be "in accordance with the rules of that court." RMC 908(b)(11).

In turn, the rules of this Court are clear on when the Government's brief on appeal is to be filed. Rule 14(c)(1) of this Court's rules, promulgated on 27 June 2007, provides that, in "appeals by the United States under RMC 908," the "government brief will be filed within 30 days after the order or ruling being appealed." Accordingly, Rule 14(c)(1) lays down the baseline standard for briefing in appeals by the United States—the Government's brief, absent an alternative order from this Court in a specific case, is due 30 days after the ruling being appealed.¹

Creating potential ambiguity is another layer of provisions promulgated by the Secretary of Defense entitled the *Regulation for Trial by Military Commission*. Section 25-5(f) of that

¹ Symmetrically, Rule 14(c)(1) provides the Defense with 30 days after receipt of the Government's brief to file the Defense's responsive brief on appeal.

Regulation requires that the “appeal must be filed with the CMCR within five days of the ruling.” But Section 25-5 does not specify what the “appeal” should include, and the section never refers to the “brief” in support of the Government’s appeal. The Deputy Clerk of this Court, on July 3, relied on this provision to provide preliminary advice that the “appeal” must be filed within five days of Judge Brownback’s June 29 order denying the Government’s motion for reconsideration. As described above, the Government began, completed, and filed its brief within the next 24 hours in an abundance of caution and due to the lack of absolute clarity in the applicable rules, read together.²

The Government believes that the best reading of these intersecting rules is that the Government must file with the Court of Military Commission Review the notice of appeal, representing its “appeal,” within five days of the order being appealed. The time for filing with the Court briefs in support of the appeal is governed by the only rule expressly addressing such briefs—Court of Military Commission Review Rule of Practice 14(c)(1). After all, if the thirty-day time limit were not to apply in this case, Rule 14(c)(1), which exclusively addresses appeals by the United States, would be a dead letter. Here, the military judge’s ruling has terminated all proceedings, and it is not as if there were a continuing trial, parts of which are on hold pending this Court’s resolution of the appeal, that would suggest a structure of extraordinary expedition. Accordingly, the Government asks that this Court clarify that, going forward, the Government’s brief in appeals by the United States shall be due within 30 days of the ruling being appealed,

² And there are still other parts of the Regulation that touch on procedures for an appeal by the United States. Section 20-9(c) of the Regulation, for example, requires trial counsel to “*promptly* send a copy of the notice of appeal to the Chief Prosecutor,” along with a variety of other materials such as the record and trial counsel’s opinion on whether certain issues warrant appeal. If the Chief Prosecutor agrees an appeal is warranted, he is instructed to “*immediately* cause the appeal to be filed with the Court of Military Commission Review.” These procedures, the Government believes, pertain solely to the internal management of the Office of the Chief Prosecutor and do not concern any filing, much less briefing, deadlines, in this Court. Similarly, Sections 25-5(d) (concerning “Appeals Forwarded”) and 25-5(e) (concerning “The decision to appeal”) of the Regulation address materials that will be forwarded by trial counsel to the Chief Prosecutor, in addition to the appeal, to assist the Chief Prosecutor in deciding whether to appeal. These rules also do not affect the time for filing briefs before this Court.

unless this Court issues an order shortening or lengthening the time for briefing in a specific case.

The Government's request in this regard seeks guidance for future cases. The Government's request for additional time to file a more comprehensive review of the issues, in light of the Defense's request for additional time for filing its brief, is the Government's proposal for an ordered system of briefing the important issues presented in *United States v. Khadr*.

Relief Requested

Accordingly, the Government respectfully requests that this Court establish a new 19 July 2007 deadline for the Government to file additional briefing matters. Additionally, the Government requests that this Court provide guidance to the Government going forward on the proper time for filing briefs in support of its appeals, absent an overriding order by this Court scheduling briefing in a particular case.

//original signed//
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Major, U.S. Marine Corps
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was emailed to Lieutenant Commander Kuebler on the 12th day of July 2007.

//original signed//
Jeffrey D. Groharing
Prosecutor
Office of Military Commissions
**[email address and
office telephone number deleted]**